No. 10,574

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JACK W. BAGLEY,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLEE.

FRANK J. HENNESSY,
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Co., Shipbuilding Division, San Francisco, California, that he had earned $2761.01 during the past twelve months and that the occupation for which he was best fitted is shipfitting (T. pp. 22-24). Appellant filed a "Special Form for Conscientious Objector" on August 27, 1942 (T. p. 51), in which he stated:

> "I claim the exemption provided by the Selective Training and Service Act of 1940 for conscientious objectors, because I am conscientiously opposed, by reason of religious training and belief, to participation in war in any form and to participation in any service which is under the direction of military authorities." (T. p. 45.)

In this form appellant stated that he was not a member of any religious sect or organization (T. p. 49), and asserted that,

> "I have talked against war to the majority of people that I have come in contact with ever since the war in Europe started." (T. p. 53.)

Appellant also stated to an agent of the Federal Bureau of Investigation that his belief of conscientious objection resulted from his mother's teachings, from his own ideas and from the teachings of Mankind United (T. p. 81). The Local Board rejected his claim and on October 8, 1942 unanimously classified him in Class I-A and mailed him a notice of such classification (T. pp. 41 and 53). The appellant was granted a personal hearing before the members of the Local Board, but the decision of the Local Board remained unchanged (T. p. 83). Thereafter the appellant filed an appeal from the decision of the Local Board to the

Board of Appeal (T. p. 53) and on May 26, 1943, the Board of Appeal unanimously affirmed the decision of the Local Board and the appellant was notified of such action (T. p. 54). The file of the Local Board likewise discloses that, as an incident of the appeal, a hearing was conducted by the Department of Justice pursuant to Section 5(g) of the Selective Training and Service Act of 1940 (T. p. 65), that such hearing was held before a Hearing Officer in San Francisco, California, on March 23, 1943 (T. p. 66), that the appellant appeared accompanied by his mother and his father, that all of them were heard (T. pp. 67 and 68), and that the Hearing Officer recommended that appellant's claim as a conscientious objector should not be sustained and that he should be retained in Class I-A (T. p. 78). Appellant wrote a letter to the National Director of Selective Service requesting the Director to take a presidential appeal on his behalf (T. p. 64), but the records of the Local Board disclose that no such affirmative action was taken (T. p. 42). On July 3, 1943, the Local Board mailed the appellant an order to report for induction into the land or naval forces of the United States at Redwood City, California, on the 17th day of July, 1943 (T. p. 58). Appellant admitted the receipt of the order to report for induction and his failure to report (T. p. 81). The appellant was likewise mailed a notice of delinquency, to which he failed to respond (T. p. 61). It was because of the failure to comply with the order of induction that he was indicted for a violation of the Selective Training and Service Act of 1940, as amended (50 USCA, Section 311).

THE ISSUE.

All of appellant's assignments of error raise but a single issue, which we believe may be fairly and correctly stated as follows:

May a defendant who has been indicted for his failure to report for induction into the armed forces of the United States defend such failure in a criminal prosecution by collaterally attacking the Board's administrative acts?

POSITION OF THE GOVERNMENT.

The answer to the above-stated question is "No".

ARGUMENT.

The issue above stated is precisely the one considered by the Supreme Court of the United States in the case of

Falbo v. The United States of America, decided January 3, 1944 (No. 73, October Term, 1943),

in which the said Court affirmed the conviction of the appellant. In its decision the Supreme Court said:

> "The narrow question therefore presented by this case is whether Congress has authorized judicial review of the propriety of a board's classification in a criminal prosecution for willful violation of an order directing a registrant to report for the last step in the selective process. We think it has not."

To the same effect see also:

United States v. Bowles, 131 F. (2d) 818 (CCA-3), affirmed on another ground, U. S. 333;

United States v. Grieme, 128 F. (2d) 811 (CCA-3);

Fletcher v. United States, 129 F. (2d) 262 (CCA-5);

United States v. Kauten, 122 F. (2d) 703 (CCA-2);

United States v. Mroz, 136 F. (2d) 221 (CCA-7);

Gutman v. U. S. (CCA-9), unreported, decided March 7, 1944, No. 10,488.

On authority of the decision of the Supreme Court of the United States in the *Falbo* case, appellee rests his case.

Appellant places great stress on what he considers the failure of the Hearing Officer to accord him a full and fair hearing, although there is nothing in the record of this case to warrant such an accusation. Assuming, however, for the sake of argument that this accusation was true, it is nonetheless the contention of the appellee that the *Falbo* case is authority for the proposition that the failure to afford a registrant a full and fair hearing cannot be properly raised as a defense in a criminal prosecution for a violation of the Selective Service Act. In

Gutman v. United States, supra,

the appellant attempted to secure a reversal of his Selective Service conviction, assigning as error, among other things, that his Local Board had failed to accord

him a full and fair hearing when he appeared before its members. This Honorable Court gave no sanction to this defense and affirmed the judgment of conviction on authority of the *Falbo* case. Certainly it cannot be argued that the failure of the Hearing Officer to accord a full and fair hearing is a denial of "due process" when the failure of the Local Board to accord such hearing is not considered as such. Thus the appellee's contention that the *Falbo* case is not controlling in the case at bar would appear to be completely without merit.

CONCLUSION.

Accordingly we respectfully submit that the judgment of the District Court was correct and it should be affirmed.

Dated, San Francisco,
April 14, 1944.

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